REGULATING CHILD LABOR BY FEDERAL TAXATION

In 1916 Congress enacted the statute commonly known as the Child Labor Law[1] which forbade the transportation in interstate commerce of goods made in factories in which children under fourteen were employed or in which children between fourteen and sixteen were employed more than eight hours a day. Every state in the Union had adopted laws to regulate the employment of minors,[2] but such regulations showed great diversity among the states in respect to age and working conditions under which minors might legally be employed. Uniformity throughout the country could be obtained only by federal enactment, hence the congressional statute under the label of the elastic commerce clause.[3] But the Supreme Court held the statute unconstitutional, chiefly on the ground that its necessary effect was to regulate the hours of labor of children in business establishments within the states—a field belonging exclusively to the state.[4]

Within six months after the decision was announced Congress again attempted to attain the desired end of uniformity, this time resorting to the taxing power. In the Revenue Act of 1918 were included sections[5] which levy a tax of ten per cent on the net profits of employers who employ in factories children under fourteen or employ children between fourteen and sixteen more than eight hours a day. The only material difference between this Act and the former Child Labor Law

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[1] "An Act to prevent interstate commerce in the products of child labor and for other purposes." Act of September 1, 1916 (39 Stat. at L. 675) ch. 432.

[2] Statement of Mr. Justice Day in *Hammer v. Dagenhart* (1918) 247 U. S. 251, 275, 38 Sup. Ct. 529, 532.

[3] See Thurlow M. Gordon, *The Child Labor Law Case* (1918) 32 HARV. L. REV. 45, 63.

[4] *Hammer v. Dagenhart, supra* note 2, at p. 276, 38 Sup. Ct. at p. 533: "In our view the necessary effect of this act is, by means of a prohibition against the movement in interstate commerce of ordinary commercial commodities, to regulate the hours of labor of children in factories and mines within the states,—a purely state authority. Thus the act in a twofold sense is repugnant to the Constitution. It not only transcends the authority delegated to Congress over commerce, but also exerts a power as to a purely local matter to which the Federal authority does not extend."

The opinion evoked extensive comment, some adverse, some favorable. T. R. Powell, *The Child Labor Law* (1918) 3 So. L. QUART. 175; Thurlow M. Gordon, *op. cit.* 32 HARV. L. REV. 45; NOTES (1918) 17 MICH. L. REV. 83; Andrew A. Bruce, *Interstate Commerce and Child Labor* (1918) 3 MINN. L. REV. 89; William C. Jones, *The Child Labor Decision* (1918) CALIF. L. REV. 395; Minor Bronaugh, *A Federal Regulation of Child Labor* (1918) 22 LAW NOTES, 86; Robert E. Cushman, *The National Police Power* (1919) 3 MINN. L. REV. 452; Frederick Green, *The Child Labor Law and the Constitution* (1919) 2 ILL. L. BUL. 126; Henry W. Biklé, *The Commerce Power and Hammer v. Dagenhart* (1919) 67 U. PA. L. REV. 21.

[5] "An Act to provide revenue and for other purposes." Act of February 24, 1919 (40 Stat. at L. 1057) ch. 18, secs. 1200-1207.

is that in the 1916 Act the penalty was exclusion of the employer's products from interstate commerce, while in the 1918 Act the penalty is a ten per cent tax upon the net income derived from his business. That the real purpose of the measure was not to raise revenue but to discourage the employment of children under conditions which do not conform to the prescribed standard is obvious; and such, of course, will be the effect of the Act. This was frankly admitted by all advocates of the bill during the Senate debates upon it.[6]

This brief outline of the historical setting of the Child Labor Tax Law is essential to a consideration of the legal problem involved therein, namely the constitutionality of the tax.

On its face the Law imposes an excise tax which Congress has undoubted power to levy. Its direct effect, however, will be to raise little or no revenue while its indirect effect will be to regulate the employment of children within the states—a matter within the police power of each state. Does the Act, therefore, deal with a matter reserved exclusively to the states by the Tenth Amendment? This is the problem; and were it not for the previous Child Labor decision the answer would seem on authority too clear to require comment.

In *McCray v. United States*[7] the Supreme Court sustained a federal excise tax of ten per cent on oleomargarine colored to resemble butter. It was conceded that the tax would have the indirect effect of preventing the manufacture of the article and that this was a subject within the field of direct control by the state. The taxpayer contended that Congress had exerted its acknowledged taxing power for an unlawful purpose, because the necessary operation and effect of the tax was to destroy the oleomargarine industry and thus to exert a power reserved to the several states; but the court rejected this argument,[8] and, as

[6] Cong. Rec. Dec. 18, 1918, p. 620: "Mr. Overman: Mr. President, the Senator from Massachusetts (Mr. Lodge) very frankly admits that the purpose of this provision is to nullify a decision of the Supreme Court of the United States. This bill is entitled 'A bill to raise revenue'; that is stated as its purpose. I want to ask my colleague if this provision was inserted for the purpose of raising revenue? Was it the desire of the committee to raise revenue when they incorporated this provision in the bill?"

"Mr. Simons: I can only make the statement to my colleague that there was no estimate presented to the committee as to the amount of revenue which would be derived from it; and I do not think anyone suggested that any would be derived."

[7] (1904) 195 U. S. 27, 24 Sup. Ct. 769.

[8] At p. 56, 24 Sup. Ct. at p. 776, Mr. Justice White said: "The decisions of this court from the beginning lend no support whatever to the assumption that the judiciary may restrain the exercise of a lawful power on the assumption that a wrongful purpose or motive has caused the power to be exerted."

In re Kollock (1897) 165 U. S. 526, 536, 17 Sup. Ct. 446, 447. Fuller, C. J., said: "The act before us is on its face an act for levying taxes, and although it may operate in so doing to prevent deception in the sale of oleomargarine as and for butter, its primary object must be assumed to be the raising of revenue."

Mr. Justice Holmes said in referring to the case in his dissenting opinion in the Child Labor decision, "In a very elaborate discussion the present Chief Justice [White] excluded any inquiry into the purpose of an act which, apart from that purpose, was within the power of Congress."[9] In the Child Labor case the majority gave lip service to the correctness of this principle[10] but in their actual decision they departed from it. They fixed their attention not on the direct result of the statute, which was to exclude from interstate commerce products of factories where children were employed—a subject within the field of Congressional power—but on the indirect result, which was to regulate the hours of labor of children, and they declared that therefore the law encroached upon the reserved power of the states.[11]

Reasoning from the premises that Congress cannot do indirectly that which it is forbidden to do directly and that the regulation of labor is inherently in the states, Judge Boyd of the District Court for North Carolina has held the Child Labor Tax Law invalid. *George v. Bailey* (1921, W. D. N. C.) 274 Fed. 639. His opinion stresses the former Child Labor case,[12] but makes no reference to the *McCray* case.[13]

The premise that Congress cannot do indirectly that which it is forbidden to do directly is not universally true.[14] As already indicated, the tax on colored oleomargarine was sustained[15] although its indirect effect was to prevent the manufacture of the article—a thing which

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[9] *Hammer v. Dagenhart, supra* note 2, at p. 278, 38 Sup. Ct. at p. 533.

[10] *Ibid.* at p. 276, 38 Sup. Ct. at p. 532: "We have neither authority nor disposition to question the motives of Congress in enacting this legislation." Cf. note 11.

[11] *Ibid.* at p. 271, 38 Sup. Ct. at p. 520: "The act in its effect does not regulate transportation among the states, but aims to standardize the ages at which children may be employed in mining and manufacturing within the states." See also *supra* note 4.

[12] At p. 642: "Upon consideration of the prime question in this case and the authorities bearing upon it, the conclusion seems irresistible that the national Legislature cannot do indirectly that which it is forbidden by the Constitution to do directly; and it being definitely determined by the highest court of the land that the right to regulate labor is inherent in the states, then Congress cannot intervene to control it, either by way of interstate commerce, efforts to levy taxes, or by any other method."

[13] *Supra*, note 7.

[14] Mr. Justice Holmes in his dissenting opinion in *Hammer v. Dagenhart, supra* note 2, at p. 277, 38 Sup. Ct. at. p. 533, says: "The objection urged against the power is that the states have exclusive control over their methods of production and that Congress canot meddle with them; and taking the proposition in the sense of direct intermeddling I agree to it and suppose no one denies it. But if an act is within the powers specifically conferred upon Congress, it seems to me that it is not made any less constitutional because of the indirect effects it may have, however obvious it may be that it will have those effects; and that we are not at liberty upon such grounds to hold it void."

[15] *McCray v. United States, supra* note 7; *Weber v. Freed* (1915) 239 U. S. 325, 36 Sup. Ct. 131.

Congress could not do directly. Indirectly Congress may limit the manufacture and sale of impure foods,[16] intoxicants,[17] lottery tickets,[18] or other articles,[19] by closing the channels of interstate commerce to such articles, although in respect to no one of them could Congress by direct legislation have effected regulation. The Child Labor case did not purport to overrule these cases, but to distinguish them. It is not safe, therefore, to conclude that Congress cannot by taxation accomplish indirectly a result which is admittedly beyond Congressional power to accomplish by direct legislation.[20]

The principle which excludes judicial inquiry into the purpose of an act which on its face is within a constitutional power of Congress gives to the legislative branch of the Government a broad and dangerous power.[21] Improper use of such power may be used seriously to curtail the power of the states over local affairs.[22] But history shows that it has seldom been so used. And the sound remedy, as the Supreme Court has said, is an appeal to the electorate rather than to the judiciary.[23] Beyond certain limits, indeed, arising from the principles of the Constitution itself, Congress cannot go. Taxing an instrumentality of a

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[16] *Hipolite Egg Co. v. United States* (1911) 220 U. S. 45, 31 Sup. Ct. 364.

[17] *Clark Distilling Co. v. Western Md. Ry.* (1917) 242 U. S. 311, 37 Sup. Ct. 180.

[18] *Champion v. Ames* (1903) 188 U. S. 321, 23 Sup. Ct. 321.

[19] See cases collected in Gordon, *op. cit.* 32 HARV. L. REV. 45, 56-67.

[20] It is suggested that the present tax law is valid in (1919) 22 LAW NOTES, 205, and NOTES (1918) 17 MICH. L. REV. 83, 87.

[21] In the *McCray* case, *supra* note 7, at p. 55, 24 Sup. Ct. at p. 776, Mr. Justice White said: "It is, of course, true, as suggested, that if there be no authority in the judiciary to restrain a lawful exercise of power by another department of government, where a wrong motive or purpose has impelled to the exertion of the power, abuses of power conferred may be temporarily effectual. The remedy for this, however, lies not in the abuse by judicial authority of its functions, but in the people upon whom, after all, under our institutions, reliance must be placed for the correction of abuses committed in the exercise of a lawful power."

[22] See Cong. Rec. (Dec. 18, 1918) p. 619: "Mr. Hardwick: . . . . If the Senator feels that the police power of any one or more states was not exercised in a way to conform to the Senator's judgment, if it were possible to do so, the Senator would not hesitate to constitute Congress as a final judge of the matter whether they had been properly exercising it or not, and would use the taxing power to carry out his own ideas?

"Mr. Lodge: It is not a question of my own ideas.

"Mr. Hardwick: I am asking the question in all sincerity. Would not that sort of doctrine utterly destroy the right of the local community to regulate its domestic concerns?

"Mr. Lodge: I say we ought to do it as little as possible.

"Mr. Hardwick: It is a very dangerous doctrine.

"Mr. Lodge: I admit it is a dangerous power to use, but I think cases have arisen where it is less dangerous to use the power than to neglect the evil. I think there is very much better and stronger ground for this legislation than there was for the oleomargarine legislation. . . . ."

[23] *Supra* note 18; see also *Gibbons v. Ogden* (1824, U. S.) 9 Wheat. 1, 197.

state government will be held unconstitutional.[24] Conceivably the Supreme Court may decide that Congress has gone too far in the Child Labor Tax Law because the indirect result is to regulate a local matter. But to reach this decision they must overrule the *McCray* case and distinguish the case of *Veazie Bank v. Fenno*.[25] It does not seem likely that they will do so. While there may be no sound reason for differentiating between the commerce power and the taxing power in determining whether to go behind the face of the statute, it is not believed that *Hammer v. Dagenhart*[26] represents so complete a change in the court's attitude on the subject of judicial inquiry into legislative motive, evidenced by the effect of the statute, as must be effected before the Child Labor Tax Law can be held unconstitutional. Opinions may differ as to the wisdom of using taxation to accomplish an end, however commendable, other than the raising of revenue, but in seeking to escape one evil we should not fly to another. In the doctrine that the court may intrude its judgment upon questions of policy or morals whenever a statute comes before it, would be an equal danger, that of judicial autocracy.

T. W. S.

WHEN A BAILMENT BECOMES A PLEDGE

One of the most difficult combinations of facts which any court has recently been called upon to analyse was presented to the British Court of Appeal in the interesting case of *Blundell-Leigh v. Attenborough* [1921] 3 K. B. 235. On the first of November the plaintiff delivered to one Miller certain jewelry, under an agreement whereby the latter was to examine it and determine how much money he would offer to lend the former on it as security. Miller, on the third of November, pledged the jewelry for one thousand pounds to the defendant, who acted in good faith. Pursuant to an agreement made on November the fifth, Miller, on that date, loaned five hundred pounds to the plaintiff, who gave him her promissory note for six hundred pounds, payable in six equal monthly instalments, the whole amount to become due upon default in the payment of any instalment. Miller was to retain the jewelry, and the plaintiff gave him written authority to realize in case she defaulted. Miller subsequently borrowed three hundred pounds from one Berners and deposited with him the plaintiff's promissory note and the defendant's counterfoil deposit note. Miller committed

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[24] *The Collector v. Day* (1871, U. S.) 11 Wall. 113.

[25] (1869, U. S.) 8 Wall. 533, sustaining a tax on the notes of state banks, the obvious purpose and actual effect of which was to drive their circulation out of existence. There was, however, ground independent of taxation on which might be rested the power of Congress, namely its power to maintain the national currency.

[26] *Supra* note 2.